Supreme Court, U.S.
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No. 86-_____

IN THE
Supreme Court of the United States
OCTOBER TERM, 1986

ROBERT PRICE and TIMOTHY SULLIVAN, *et al.*,

Petitioners,

v.

INTERNATIONAL UNION, UNITED AUTOMOBILE AEROSPACE and AGRICULTURAL IMPLEMENT WORKERS of AMERICA, MARINE DRAFTSMEN ASSOCIATION, LOCAL 571, UAW, AFL-CIO and GENERAL DYNAMICS CORPORATION, ELECTRIC BOAT DIVISION,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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QUESTIONS PRESENTED

1. Whether a non-union employee of a private-sector employer in an industry governed by the National Labor Relations Act ("NLRA") states a federal cause of action, under either the NLRA or the First Amendment to the United States Constitution, by the complaint that his employer and the union acting as his exclusive representative under color of Section 9(a) of the NLRA require him, through a compulsory unionism agreement authorized by Section 8(a)(3) of the NLRA, to pay for union activities unrelated to the union's duties as his exclusive representative?

2. Whether a non-union employee can, as a matter of law, be treated as a member of a union subject to its internal rules, regulations, procedures, and policy decisions solely by virtue of an agreement between his employer and

exclusive representative requiring "membership" in that union as a condition of his employment as authorized in Section 8(a)(3) of the NLRA?

3. Does either the NLRA or the First Amendment preclude an exclusive representative from enforcing a compulsory unionism agreement against non-union employees without first having established procedural protections adequate to prevent the collection and use of compulsory "dues" for union activities unrelated to its duties as the employees' exclusive representative?

4. Whether the court of appeals holding that any claim of breach of the statutory duty of fair representation is negated by an intra-union procedure for collecting full union dues and which is later used to deny any portion to objecting employees. Is that procedure statutorily and constitutionally adequate, or does it amount to an illegal

"rebate" scheme and otherwise fail to meet the procedural requirements of union security arrangements enunciated in this Court's decisions?

EDITOR'S NOTE

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RESPONDENTS:

International Union, United Automobile Aerospace And Agricultural Implement Workers of America; Marine Draftsmen Association, Local 571, UAW, AFL-CIO and Electric Boat Division, General Dynamics Corporation,

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INTERNATIONAL UNION OF
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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioners, Robert Price and Timothy Sullivan, et al., respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Second Circuit in the above-entitled case.

OPINIONS BELOW

The opinion and order of the United States Court of Appeals for the Second Circuit, reported at 795 F.2d 1128 (2d Cir. 1986), is reproduced in the appendix

at pages i to xx. The opinion and order of the United States District Court for the District of Connecticut, reported at 621 F. Supp. 1243 (D. Conn. 1985), is reprinted in the appendix at pages xxii to lix. The order of the court of appeals denying rehearing and rehearing en banc is reprinted in the appendix at page xxi.

JURISDICTION

The judgment of the Court of Appeals was entered on July 16, 1986 and a timely petition for rehearing and rehearing en banc was denied on September 24, 1986. This Court has jurisdiction to review the judgment of the Second Circuit under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

The First Amendment to the United States Constitution and Sections 7, 8(a)(3) and 9 of the National Labor Relations Act, 29 U.S.C. § 151 et seq,

and the Railway Labor Act, 45 U.S.C. § 152 et seq. are involved in this case. The pertinent text of these provisions is set out in the Appendix at 1x.

STATEMENT OF THE CASE

This case involves the question whether a labor union which is granted exclusive bargaining status under the National Labor Relations Act ("NLRA") can exact from non-union employees of the bargaining unit dues which it will spend for purposes other than collective bargaining, contract administration and grievance representation. These issues are currently pending before the Court in the union petition in Communications Workers of America v. Beck, No. 86-637 and the employee cross-petition, Beck v. Commuication Workers of America, No. 86-966 (Dec. 11, 1986).

1. Petitioners Robert Price and Timothy Sullivan filed the complaint in

this case on November 15, 1984 in the United States District Court for the District of Connecticut. Both are employee draftsmen for General Dynamics Corporation, Electric Boat Division ("employer") in Groton, Connecticut. They are non-union employees in a bargaining unit represented by respondents International Union, United Automobile, Aerospace and Agricultural Implement Workers of America and Marine Draftsmen Association Local 571, UAW, AFL-CIO ("union"). The union represents a unit of technical and clerical employees working in engineering and engineering support at the employer's shipyard in Groton, Connecticut.

Federal court jurisdiction over the complaint was alleged under 28 U.S.C. §§ 1331, 1337, 2201, 2202 and 29 U.S.C. § 185 for injunctive relief, declaratory

judgment and damages (J.A. 3).[1] An amended complaint was filed on January 14, 1985 which added 250 non-union employees as plaintiffs.

2. On August 24, 1984, respondent union and respondent employer entered into a collective bargaining agreement which contained a union security clause. Amended Complaint ¶¶ 4, 5 (J.A. 4). The agreement required maintenance of membership in the union and payment of initiation fees and membership dues as prescribed in the unions' by-laws and constitution, to the extent permitted by "applicable State and Federal law." (J.A. 4, 15).

Petitioners accordingly requested that the union provide them with information regarding the pro-rata share of

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[1] "J.A." references are to the Joint Appendix filed in the United States Court of Appeals for the Second Circuit.

collective bargaining/contract administration costs which they should pay to comply with the union security provision of the contract. (J.A. 17, 18). The union responded to them by certified mail dated October 31, 1984 that the full amount of initiation fees and or dues was required within ten days or it would seek petitioners' discharge. (J.A. 29-33).

The union thereafter enlisted the aid of the company by requesting it to discharge the objecting petitioners. The employer notified petitioners that they would indeed be discharged for failure to pay "union dues and/or initiation fees."

> The union has requested your discharge for failure to pay dues and/or initiation fees. If you do not supply me with evidence that you have satisfied these obligations before the closed [sic] business day on Friday, January 11, 1985, you will be discharged.

(J.A. 51).

Consequently, to keep their jobs, petitioners have been paying 100% of union dues under protest. (J.A. 43).

In their complaint, petitioners alleged that dues had been "arbitrarily set by Defendant Unions in excess of Plaintiffs' pro rata share" and demanded an accounting of union finances to establish expenses attributable to the union's collective bargaining, grievance representation and contract administration duties. (J.A. 7-8). They also requested a 100% escrow of dues until proof of their proportionate share of bargaining unit related expenses was provided to them, in advance of collection, by the union. (J.A. 9).

On cross-motions for summary judgment the district court ruled against petitioners on each count of their

complaint. It determined that section 8(a)(3)'s authorization of the "union shop" created no "state action" jurisdiction for purposes of federal constitutional analysis. Price v. UAW, 621 F. Supp. 1243, 1247 (D. Conn. 1985). (App. xxxvii).[2] It also held that the "union's use of dues and fees is purely an internal union matter." The court expressly chose not to follow the Ninth Circuit decision in Seay v. McDonnell Douglas Corp, 497 F.2d 996 (9th Cir. 1970). 621 F. Supp. at 1249. (App. at xliv).

On appeal, the Second Circuit ruled that there is no "governmental action" analogy between § 2, Eleventh of the Railway Labor Act ("RLA") and § 8(a)(3) of the NLRA. Consequently, since no state statute is preempted by federal law

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[2]"App." references are to the pages attached as the Appendix to this Petition.

under the NLRA (unlike the RLA), no "state action" was present. (App. xi).

The court of appeals held that neither § 8(a)(3) nor the judicially created duty of fair representation limits a union's power to set and collect agency fees in any amount it chooses. (App. xviii). Moreover, the court of appeals determined that this case was also an internal union dispute. Price v. UAW, 795 F.2d 1134 (2d Cir. 1986). (App. xiv). It mistakenly treated the petitioners as union members, viewing the dispute as between members who voluntarily joined the union and those who were forced to join:

> their contention is that, in this instance, they should be treated differently because they disagree with the views of those who joined the union voluntarily rather than under the compulsion of the union security clause.

795 F.2d at 1136 (emphasis in original). (App. xix).

The record is indisputable that petitioners are not union members, have not joined the union and have asserted that they are not required to join the union as a condition of employment pursuant to NLRB v. General Motors, 373 U.S. 734, 742 (1963).[3]

[3] "Although Plaintiffs are members of the collective bargaining unit, we are not members of the Defendant Union." Affidavit of Robert Price in Support of Motion for Summary Judgment, ¶ 14. (J.A. 41).

REASONS FOR GRANTING THE WRIT

I.

THE DECISION OF THE SECOND CIRCUIT CREATES A CLEAR CONFLICT IN THE CIRCUITS THAT WILL CAUSE CONSIDERABLE UNCERTAINTY AND LITIGATION BY HOLDING THAT A LABOR UNION DOES NOT VIOLATE ITS DUTY OF FAIR REPRESENTATION WHEN IT OBTAINS A CONTRACT REQUIRING NON-UNION MEMBERS TO CONTRIBUTE TO ITS POLITICAL, ORGANIZING AND INSTITUTIONAL PROGRAMS

A. THE NATIONAL INTERESTS INVOLVED

The National Labor Relations Act covers virtually all private employment in the United States. Twenty nine states have elected not to enact statutes proscribing union security provisions in collective bargaining agreements enforced in their jurisdictions. Some ninety per cent of union agreements adopted in those states, in industries covered by the NLRA, contain such provisions which limit the freedom of more than 6,000,000 workers. See Petition for Writ of Certiorari, CWA

v. Beck, No. 86-637 (filed Oct. 17, 1986) at 9.

Although there are no statistics on the amount of money collected by labor organizations as a consequence of compulsory unionism agreements, total dues in 1982 amounted to more than $1,422,945,000.00 for all parent labor organizations alone. L. Troy & N. Shelfin, Union Source Book, at 4-1 (1985)(Lib. Cong. No. 85-14724)(extracted from Department of Labor LMRDA reports). Thus, substantial financial interests of both unions and millions of individual workers in interstate commerce are affected by the present uncertainty as to what may be required by a union security agreement authorized by the NLRA.[4]

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[4]Nationally, private sector workers covered by union contracts number about 12,441,000 persons which account for 20.5% of persons employed, but only 11,256,000 are union members. Bureau of (continued...)

However, an even more fundamental national interest is implicated. The congressional declaration of policy in section 1 of the NLRA establishes that "protecting the exercise by workers of full freedom of association" is a fundamental purpose of the statute. 29 U.S.C. § 151; see Mastro Plastics Corp. v. NLRB, 350 U.S. 270, 280 (1956). It is that "policy of voluntary unionism imbedded in the Act," Pattern Makers v. NLRB, 105 S. Ct. 3064, 3071 (1985), that is jeopardized by the present conflict between the circuits as to the scope of the union security provisions authorized by § 8(a)(3).

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[4](...continued)
Labor Statistics, Employment and Earnings (January 1985). Thus, at least 1,185,000 workers (10%) nationally are jeopardized by the dispute now raging between the circuits.

B. THE IRRECONCILABLE CONFLICT

Section 9 of the National Labor Relations Act clothes a qualifying labor organization with "power comparable to those possessed by a legislative body both to create and restrict the rights of those whom it represents. . .." Steele v. Louisville & Nashville R. Co., 323 U.S. 192, 202 (1944). Yet, the "powers" described by the Court are precisely those emanating from § 9 itself, namely, "for the purposes of collective bargaining in respect to rates of pay, wages hours of employment, or other conditions of employment . . .." 29 U.S.C. § 159(a).

Petitioners' complaint objected to the extraction from their paychecks, as dues, any amounts unrelated to the unions' statutory obligation to represent them for collective bargaining, grievance and contract administration purposes.

Petitioners objected to forced payments related to the unions' political activity, ideological causes, organizing efforts, and other institutional programs. (J.A. 5-6, ¶8).

In support of their claim, petitioners relied upon the decisions in Beck v. CWA, 776 F.2d 1187 (4th Cir. 1985)[5] and Seay v. McDonnell Douglas Corp., 427 F.2d 996 (9th Cir. 1970). Both cases held that a labor organization breaches its duty of fair representation of the bargaining unit by obtaining a collective bargaining agreement requiring non-union members to pay dues to support union activities unrelated to collective bargaining. Beck

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[5] Case History: Beck v. Communication Workers of America, 468 F. Supp. 93 (D.Md. 1979), aff'd, 776 F.2d 1187 (4th Cir. 1985)(2-1 decision), aff'd on reh'g en banc, 800 F.2d 1280 (4th Cir. 1986)(6-4 decision), petition for cert. filed, 55 U.S.L.W. 3317 (Oct. 17, 1986)(No. 86-637), cross petition for cert. filed, No. 86-966 (Dec. 11, 1986).

was affirmed by the Fourth Circuit sitting en banc. Beck v. CWA, 800 F.2d 1280 (4th Cir. 1986)(per curiam). The case was docketed in this Court on October 17, 1986 by the unions' petition for writ of certiorari as Case No. 86-627.[6] Petitioners respectfully suggest that the instant case should be consolidated for consideration with Beck in this Court.

The Second Circuit decided, however, that petitioners cannot show

> that the union acted arbitrarily, discriminatorily, or in bad faith either in negotiating, executing, or enforcing the security clause, or in spending the resultant funds. . .. in the absence of some special circumstance not present, or even suggested, here, a union cannot be said to have acted arbitrarily,

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[6]On December 8, 1986, this Court invited the Solicitor General to express the views of the United States in the case.

> discriminatorily, or in bad faith merely because it has successfully negotiated a union security clause.

795 F.2d at 1135. (App. xviii).

Further, the Second Circuit found that,

> [t]he union's expenditures on organization and recruitment, insurance plans, strike funds, scholarship funds, union publications, and litigation unrelated to collective bargaining are for activities regularly engaged in by modern unions.

Id. at 1135-36 (App. xix).

Because in its view this was not irrational conduct or conduct deviating from an established norm, the Second Circuit viewed the allegations of the complaint as falling short of the bad faith or malice it thought necessary to hold the union liable for a breach of the duty. In this regard, the court below stated: "We respectfully disagree with the Beck majority's analysis of this

issue." 795 F.2d at 1132 (App. xi). It did not address the reasoning of the Ninth Circuit in Seay v. McDonnell Douglas Corp., 427 F.2d 996, 1000-01 (9th Cir. 1970), which also found a breach of the duty of fair representation in these precise circumstances.

This square conflict between the circuits guarantees that there will be continued uncertainty and litigation over the respective rights of union and individual workers. This Court should resolve the issue between the circuits below and give guidance to the lower federal courts and the bar at this time in order to avoid resolving numerous future appeals of the jurisdictional issues which the conflict assures.

II.
THE EMPLOYER VIOLATES § 8(a)(3) WHEN IT DISCRIMINATES AGAINST NON-UNION EMPLOYEES BY THREATENING TO TERMINATE THEIR EMPLOYMENT IF THEY REFUSE TO PAY UNION DUES UNRELATED TO COLLECTIVE BARGAINING

Section 8(a)(3) of the NLRA makes it unlawful for an employer to discriminate against his employees based upon "non membership in a labor organization." It also allows the execution of agreements requiring "membership" as a condition of employment. 29 U.S.C. §-158(a)(3).

In NLRB v. General Motors, 373 U.S. 734, 742 (1963), this Court held that "[i]t is permissible to condition employment upon membership, but membership, insofar as it has significance to employment rights, may in turn be conditioned only upon payment of fees and dues. 'Membership' as a condition of employment is whittled down to its financial core." Thus, "[f]ull union membership no longer can be a

requirement of employment. . .. Under § 8(a)(3), the only aspect of union membership that can be required pursuant to a union shop agreement is the payment of dues." Pattern Makers' League of North America v. NLRB, 105 S. Ct. 3064, 3071 & n.16 (1985).

Petitioners alleged that since they are not required under the Act to be actual union members, the extent of their responsibility to pay "periodic dues and initiation fees" is coterminous with the union's § 9(a) duty to represent unit members in collective bargaining activities. (J.A. 7).

That limitation is also suggested by a footnote in Pattern Makers, 106 S. Ct. at 3071 n.16, in discussing the limited nature of membership that can be required under § 8(a)(3) and referring to Ellis v. Railway Clerks, 466 U.S. 435 (1984), that "employees in a 'union shop' cannot be

compelled to pay dues to support certain union activities." Although Ellis was a RLA case, the Court would have had no reason to cite it if it did not view § 8(a)(3) as imposing the same limitation under the NLRA.

The courts below failed to recognize this distinction at all, treating petitioners as involuntary union members and subject to following the internal review mechanisms of the union. The uncontested affidavit of Petitioner Robert Price explicitly states otherwise. (J.A. 41).[7]

As Judge Murnaghan aptly stated in Beck,

> As an agent, the union may not seek to further its own interests at the expense of a principal. Instead, the union must use the fees

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[7]The district court also failed to ascertain the fundamental distinction of the petitioners' "financial core" membership.

> collected from employees only for purposes within the scope of the agency relationship.

Beck, 800 F.2d at 1287 (concurring opinion).

In paragraph 10 of their complaint, petitioners alleged that they had notified the Company of their protest of the unconstitutional taking, and the Company stated that it will, in fact, discharge any employee who fails to satisfy the financial obligations it established for them to the respondent unions. (Complaint, J.A. 7). The record shows that the company was ready to comply with the unions' requests in letters sent to petitioners. (J.A. 51).

The court of appeals noted the contention that the threat to be fired implicates employer activity, 795 F.2d at 1135 (App. xvii), but found it unnecessary to address the issue since

enforcement of the union security provision was in its view simply an internal union matter. Id. This holding conflicts with the implicit holding in Beck v. CWA, 776 F.2d at 1205 and Seay, 427 F.2d at 1000, that an employer violates § 8(a)(3) when it enforces compulsory dues beyond the unions' "statutory functions." Ellis, 104 S. Ct. 1892.

The refusal of the court of appeals to acknowledge the General Motors holding of this Court confuses the rights of workers to choose their union affiliation. A failure to promptly address this issue will add confusion in the lower federal courts with worker jobs the pawns subject to sacrifice. A writ of certiorari should issue to settle the questions of employee status.

III.
THE SECOND CIRCUIT'S REFUSAL TO FIND STATE ACTION IN THE NLRA'S AUTHORIZATION OF UNION SECURITY AGREEMENTS CONFLICTS WITH DECISIONS IN BECK, LINSCOTT, SEAY AND THIS COURT'S DECISION IN ELLIS

The Second Circuit's direct split with the First, Fourth and Ninth Circuits on NLRA authorization of union security agreements is itself sufficient cause for review, but also the decision below is in conflict with the applicable decisions of this Court.

In Railway Employes' Department v. Hanson, 351 U.S. 225, 231-32 (1956), this Court agreed that First and Fifth Amendment rights of objecting employees are implicated by the RLA when an employer and union enter into a union security agreement. The Court held Section 2, Eleventh of the Railway Labor Act valid insofar as "[t]he financial support required relates. . .to the work of the union in the realm of collective

bargaining," but reserved the question of the constitutionality of the imposition of compulsory dues "for purposes not germane to collective bargaining." Id. at 235-38.

In International Association of Machinists v. Street, 367 U.S. 740 (1961), the Court found that section 2, Eleventh of the RLA limited the collection and use of dues from objecting employees for political purposes. Consequently, it was unnecessary to reach the constitutionality of the union's use of the objectors' money since the statutory interpretation made it unnecessary.

Finally, in Ellis v. BRAC, 104 S. Ct. 1883 (1984), the Court found that section 2, Eleventh of the RLA did not grant unions unfettered and unlimited power to "spend an objecting employee's money to support political causes. The use of

employee funds for such ends is unrelated to Congress' desire to eliminate 'free riders' and the resentment they provoked." The Court did hold that "[t]he First Amendment does limit the uses to which the union can put funds obtained from dissenting employees" Id. at 1894.

This trilogy of cases demonstrates that unless the RLA could have reasonably been limited in conformance with the legislative purpose, the constitutional question of forced political association would have had to have been faced. Street, 367 U.S. at 749.

The court of appeals below did neither. It determined that the reason the Hanson court found "government action" present in the RLA, was because § 2, Eleventh preempted Nebraska's contrary state right to work law. Price, 795 F.2d at 1131. (App. ix). It rejected petitioners'

argument that § 8(a)(3) of the NLRA should be treated the same as § 2, Eleventh of the RLA. Price, 795 F.2d at 1133. (App. xii).

The Second Circuit rejected the Beck Court's examination of the issue ["we respectfully disagree with the Beck majority's analysis of this issue." Price , 795 F.2d at 1132] that no two statutes are more alike, since they are "phrased similarly and expressive of the same legislative purpose, should be given the same construction." Beck, 776 F.2d at 1201.

The Beck majority cogently disposes of the union argument that, unlike the RLA, no preemption of state right to work laws is present in the NLRA as result of § 14(b), 29 U.S.C. § 164(b), because the search for federal preemption ("state action") is, of itself, a red herring. The challenge in Ellis arose in

California, a non-right to work state. Accordingly,

> When the employees in Maryland, whether employed on the railroad or in other industrial installations have no rights secured under section 14(b) of the NLRA and are subject to practically identical statutory restrictions and limitations under section 8(a)'3) and section 2, Eleventh, it seems inconceivable that the Supreme Court would, in construing the two statutes, offer protection to one group of such employees and deny it to others because of some action taken by another state in enacting a statute under section 14(b) to protect only that latter states's employees.

Beck, 776 F.2d at 1201.

The Price panel never addressed the proposition above in this manner. It chose, however, to follow a District of Columbia Circuit approach to state action in Kolinske v. Lubbers, 712 F.2d 471 (D.C. Cir. 1983), that finds an absence

of state action in the NLRA due to the permissive nature in which § 8(a)(3) authorizes "the inclusion of union shop clauses subject to the whim of states, the NLRA allows private parties to do nothing more than what they could have agreed to do without the NLRA." Price, 795 F.2d at 1133 (App. xii).

Secondly, the Second Circuit determined that "no right or privilege created by the government is the source of the appellants' alleged deprivation." Price, 795 F.2d at 1133 (App. xiii). The Beck court reasoned the opposite:

> It is true, the actor is the union, but the union acts only under the warrant of federal authority. The union wears the cloak of the government; in making its demands it acts under authority vested in it by the federal government.

Beck, 776 F.2d at 1208.

The First Circuit had occasion to address the state action question in

Linscott v. Millers Falls Co., 440 F.2d 14 (1st Cir. 1971). There, Mrs. Linscott was forbidden from contributing to a union based upon her religion and she sought to offer to pay the equivalent of union dues to a non-religious charity. The union demanded that she be fired. The union alleged that no governmental activity was present to "bring the First Amendment in play." The First Circuit disagreed. Relying on Hanson, it found governmental action because if the company failed to discharge the plaintiff, "the union could institute a federally supported suit, if not an unfair labor practice charge, for failure to live up to its bargaining agreement." 440 F.2d at 17. The Second Circuit was also aware of this case, but distinguished it on the same grounds as Beck. See 795 F.2d at 1132-33. (App. xii).

Finally, the Second Circuit fails to show how the present situation involves only an internal union dispute when the "source of the union's authority in this case is not certain rules developed and set by the internal procedures of the union; its right to the service charge and its obligation in the use of the dues-equivalent collected for that purpose stem from an agency contract that exists only by virtue of federal law." Beck, 776 F.2d at 1205.

As the Price and Beck (Linscott and Seay) courts are diametrically opposed on this question, review should be granted to resolve it.

IV. THE SECOND CIRCUIT'S EMBRACEMENT OF THE UNIONS' REBATE PROCEDURE AS ADEQUATE TO COMPLY WITH THE DUTY OF FAIR REPRESENTATION CONFLICTS WITH THIS COURT'S DECISIONS IN ELLIS AND HUDSON

In their complaint, petitioners raised the argument that the unions' collection

procedure violates both their statutory and First Amendment rights. (J.A. 7-9). They also requested "the escrow of 100% of Plaintiffs' initiation fees and/or dues until Defendant Unions establish the proper proportionate share of Plaintiffs financial obligations" related to "actual costs of collective bargaining, contract administration, and grievance adjustment for the bargaining unit." (J.A. 9, Prayer for Relief, ¶¶ 1,2).

The court of appeals held that the union rebate program, relating to political causes, was statutorily sufficient.

> Without deciding whether that particular procedure would be constitutionally adequate if government action had been found here, see Ellis, 104 S. Ct. at 1892-96, we note that the union's rebate program, at a minimum, tends to negate any inference of bad faith.

Price, 795 F.2d at 136 (App. xx).

Yet, the court of appeals was clearly aware that the fairness and reasonableness of the union procedure had not been established. The Second Circuit expressly ignored the holding in Ellis v. BRAC, 104 S. Ct. at 1890, "that the pure rebate approach to this question is inadequate." Nor did it consider that even if Ellis can be ignored, petitioners are not required to submit to internal union procedures because the unions have no jurisdiction over them. But in Price, the Second Circuit held otherwise:

> "Appellants do not allege that they are being treated differently from other union members, . . ., on the contrary, their contention is that, in this instance, they **should** be treated differently because they disagree with the views of those who joined the union voluntarily rather than under the compulsion of the union security clause."

(bold emphasis in original; other added). (App. xix).

This holding is in direct conflict with the procedure established in Chicago Teachers v. Hudson, 106 S. Ct. 1066 (1986) and in other courts. Bagnall v. Air Line Pilots Assn., 626 F.2d 336, 341 (4th Cir. 1980)(union cannot bind non-members to union constitution or bylaws); Soto Segarra v. Sealand Service, Inc., 581 F.2d 291, 295 (1st Cir. 1978)("Since appellee was not a union member, he was not bound by contract with the union to exhaust any formal internal union appeals before resorting to a judicial forum"); School Committee v. Greenfield Education Assn., 385 Mass. 70, 82-83, 431 N.E.2d 180, 188 (1982)(refused to force dissenting teachers to resort to the internal union procedure in the first instance).

Here, the union controlled every step of the "review" process, the decision at each level and placed the burden on

plaintiffs to come forward with their reasons for objecting to union expenditures, but only as to those "for activities or causes primarily political in nature." U.A.W. Const. Art. 16 Section 7 (Plaintiffs Motion for Summary Judgment Exhibit I). Hence, the unions' procedural "protections" are fully inadequate to redress petitioners' statutory claims that only bargaining related activities are chargeable and that the unions' rebate procedure cannot provide adequate relief.

The adequacy of procedural methods necessary to protect non-union workers in NLRA bargaining units is presently pending consideration before the court in the Petition in Beck v. CWA, No. 86-966.

Also, in Price, the union refused to permit petitioners to avail themselves of any deduction at all or to utilize the internal union procedure, when they

attempted to object to the unions' expenditures. (J.A. 29-33). In Hudson, 106 S. Ct. at 1076, this Court observed that "[t]he non-union employee whose First Amendment rights are affected by the agency shop itself and who bears the burden of objecting, is entitled to have his objections addressed in an expeditious, fair, and objective manner." These procedural considerations should apply to the agency shop under the NLRA for "[t]he agency shop itself impinges on the non-union employees' First Amendment interests. . . ." Id. at 1077. Accordingly, the rebate procedure in form and as applied is inadequate.

Because of the fact that no procedural protections or adequate mechanisms for dissenting employees to express their dissatisfaction with the unions' use of their earnings exists, the respondents' union security agreement implicates

petitioners' rights to free political expression and the Congress' desire that the NLRA was to ensure "the exercise by workers of full freedom of association." 29 U.S.C. §151.

Therefore, the court of appeals holding that private parties, such as petitioners, must exhaust mechanisms for relief of entities to which they do not belong in order to protect any of their statutory or constitutional rights has no basis in any interpretation of law or decisions of this Court analyzing the issue.

A writ of certiorari should issue to review the Second Circuit's significant departure from the applicable decisions of this Court.

CONCLUSION

This case presents evidence of direct employer involvement in threatening the discharge of nonunion employees not

present in Beck v. CWA. If the writ is granted and the two cases are consolidated, a complete presentation of issues covered by section 8(a)(3) of the National Labor Relations Act will be presented to the Court. Without review, the relief for employees covered by the NLRA will be based on their geographical location. For these reasons, petitioners respectfully request that a writ of certiorari issue to review the judgment of the court of appeals.

Respectfully submitted,

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December 23, 1986

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 192—August Term 1985

Argued: October 2, 1985 Decided: July 16, 1986

Docket No. 85-7408

ROBERT PRICE, TIMOTHY SULLIVAN, RICHARD R. CAFFARY, ROBERT J. EUSEBIO, DONALD RAFFO, DELORIS BLANCO, DIANNE E. MARTIN, ARTHUR P. VINE, JAMES Q. RYLEY, DONALD L. BROWN, BEN J. EDWARDS, JR., ALDER K. MUTTART, SAMUEL W. HOLDRIDGE, DOUGLAS A. GILLEO, ELLEN W. MORRIS, GUSTAVE P. BRUCKER, III, GILBERT E. DIONNE, ROBERT L. MARTIN, MRS. LINDA L. ORR, THOMAS RAYMOND BRIGGS, FRED W. TAYLOR, ERNEST VETELINO, JR., ROBERT M. MALONEY, HENRY KOSYCARZ, WILLIAM E. OBERLIN, WILLIE H. ESTERS, MARILYN M. FLAHERTY, THELMA B. OLSEN, LENA M. LO GIOCO, VICTOR ANGELINI, ROBERT E. PLEBISCITO, BONNIE-JEAN JACKETT, ALFRED ROGERS, ROBERT J. MARTIN, THERESA R. WEISS, DOREENE DE NOTO, RICHARD C. NILES, DONALD R. REUSS, JR., JEANNE W. LAMPERELLI, CATHLEEN M. DONACKI, PAUL F. BROWN, ANTHONY J. PUPILLO, THOMAS J. GOMES, ALAN G. LIVINGSTONE, CLYDE W. PHELPS, DUDLEY E.

HARRIS, JACK H. COREY, JOAN R. BOISELLE, IRVING MATCHEN, FREDERICK H. SILVAVEC, GREGORY T. MARNEY, RICHARD ZELINSKI, NANCY PARVIN, CLEMENT R. PITTS, KENNETH FERRIA, BARBARA D. DIMMONS, CHARLES P. CRANDALL, III, MARTHE M. FOUNIER, JOHN R. RADLEY, ARTHUR F. CORDES, DONNA M. PADULA, ROBERT G. DELICATO, THOMAS L. BORGMAN, GARY C. PELTIER, ROBERT M. BULLOCK, SAMUEL A. ADAMS, JAMES T. KEARNEY, SALVATORE M. GRILLS, PETER N. TURCO, HAROLD G. JOSEPH, THOMAS SCHNEIDER, ERNEST L. LE BEAU, BERESFORD B. COOPER, MARLENE A. MIKULKA, NANCY M. GROSS, THOMAS L. THEROUX, KRISTINE KOZLICKY, FRANCIS X. WALTERS, TIMOTHY S. BEVINS, LOUISA BEVERLY LOPES, LORI J. OBYMAKO, THOMAS L. CLARY, DENISE M. BRAULT, JEFFERY A. MOHNKERN, WILLIAM S. PORTELLOS, LENWOOD T. ROBINS, JAMES A. MARTIN, JOHN PATRICK WALSH, KENNETH H. JODRY, REGINALD V. YOUNG, RANDOLPH COX, MARTINE A. FLORY, FRANK SAVONA, BOBBY G. SIMMONS, SR., CHRISY J. ENOS, JR., CHRISTINE BUFFON, MAURICE M. BEEBE, JR., LINDA R. MCCOY, LAURIE BROWN, GEORGE A. ENOS, JR., TAMMY L. YOUNG, LINDA J. LARSON, MILDRED A. GULA, GERALD N. CHENAIL, CLAUDE C. CARLSON, ROBERT L. DONOVER, MARY R. HILL, THOMAS F. EDWARDS, JR., D.S. RICHARDSON, III, MICHAEL E. SOUTHWOOD, RUDOLPH D. BURDICK, GILVERT H. DAVIS, ANDREW M. REES, JR., CHRISTINE A. LOPEZ, JOHN E. BARRETT, JR., PAMELA KELLY, HOWARD F. STILLWELL, MARY DEBORAH MARSHALL, NANCY LEE, ARLINE M. BROWN, JOAN M. JONES, DENISE M. PELTIER, ROBERT PESAPANE, PAMELA SPRINGER, ERIC HINZ, GEORGE W.

MACH, HAROLD J. SMITH, PAUL G. WAY, GUIDO CIACCI, CHARLES GRANVILLE, TINA MARIE BLAIS, DANA W. VIGUE, RENE S. MARCU, DELMAR G. CHERRY, JAMES H. HOPE, JOHN P. WARD, GERARD J. MORRONE, MARK F. WALTER, ANITA ANDRELLI, MICHAEL MAGLIO, WARREN LEWIS, EILEEN PUPILLO, ALYCIA F. LIMSON, FRANK B. THACKERAY, GALE E. FRANKLIN, BRUCE H. BURNHAM, VIRGINIA K. CLEARY, MABEL J. HULL, BRUCE FOSTER, MELVIN T. REAGAN, JEFFREY L. STRAW, DAVID M. SEIBERT, BRINTON W. TURNER, III, GRANT J. BOMBRIA, MICHAEL F. CIPRIANI, ROBERT P. THOMPSON, LAWRENCE J. MELLOW, CHRISTOPHER M. VENANZIO, MICHELE M. WILLIAMS, PATRICIA A. KOONCE (ROBBINS), SCOTT LAPORTE, ROSE E. WALSH, WALTER L. WOOTEN, HERBERT KANE, RAYMOND A. HAMILTON, JR., DANIEL J. FREIERT, CYNTHIA L. SLACK, SALLY R. PERKINS, DAVID GODIN, KAREN BARTHELSON, PAUL H. HUNTON, WILLIAM MEASE, DELORES JEAN MCPHERSON, NANCY E. STUMPO, ESTELLE T. CHABOT, WALTER IGNATOWICH, HERBERT O. STURMAN, CLAUDE P. HOFFMAN, BEVERLY A. DEGAETANO, JOHN J. SALVEGGIO, ROBERT C. OLSEN, ALBERT A. FERRIS, JANICE M. WILLIAMS, ESTHER T. PEPIN, WALTER E. HARRINGTON, DAVID C. KINGSBOROUGH, DAVID DUFFY, RICHARD J. BEDARD, PATRICIA A. ROSSI, MALONE S. JONES, DAVID J. GONSALVES, EDWARD J. KING, THEODORE G. BRASSARD, JOHN A. SKINNER, PAUL WHITEHEAD, DOUGLAS G. EVANS, LEONARD J. BACHMAN, GRACE E. KENYON, GINA LAKESTREAM, ELANIE W. JONES, JOHN S. HAMMETT, JAMES R. HALL, FREDERICK COONEY, PATRICIA A. WRIGHT, HAROLD CHAPPELL, ROBERT J. URBAN, MARK E. ALLARD,

DONALD A. CICCONE, DEVIN THOMAS BENTLEY, CONSTANCE HORNER, MICHAEL GIORDANO, PAUL G. WAY, GLORIA C. JACKSON, RUSSEL V. BARTH, GERALD J. ARPIN, VIRGIN G. LEE, CHRISTOPHER J. PETERS, RICHARD J. PERRAS, LAWRENCE J. MORTH, ROGER F. HARRINGTON, CLIFFORD F. SCHULTZ, GERALD F. ROGERS, JEFFREY M. APTT, JOHN SODA, PAUL E. MAYNARD, GEORGE GUIDO GARGANO, OLA R. LARSON, JOANNE SISCO, GARY J. VARGAS, RAYMOND J. CAVIGGIA, PHILIP E. RATHBUN, WILLIAM M. FISKE, HELEN E. KENNETH, JUDITH A. LAMPERELLI, JOY PENDERGRAFT, WILLIAM SYNAN, RONALD G. SHAW, ANTHONY SALAFIA, HARRY W. WHEELER, JOHN J. WOOMER, JR., ANGELO J. DIMARCO, WILLIAM R. BURRIS, JAMES H. ANDREWS, DONALD G. MAXSON, JR., SANDRA L. WAY, SCOTT CHAMPLIN BURBANK, CHARLES J. HOWARD, JR., KENNETH W. DRENNEN, HELENIA M. ILVENTO, ROSMARY J. JETTE, LAURIE ANN BOWSKI, FRANCES L. BUMBERT,

Plaintiffs-Appellants.

—against—

INTERNATIONAL UNION, UNITED AUTOMOBILE AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA; MARINE DRAFTSMEN ASSOCIATION, LOCAL 571, UAW, AFL-CIO and ELECTRIC BOAT DIVISION, GENERAL DYNAMICS CORPORATION,

Defendants-Appellees.

Before:

CARDAMONE, PRATT, and MINER,
Circuit Judges.

Plaintiffs appeal the grant by the United States District Court for the District of Connecticut, M. Joseph Blumenfeld, *Judge*, of defendant union's motion for summary judgment and defendant employer's motion to dismiss.

Affirmed.

EDWARD F. HUGHES, North Springfield, VA (Center on National Labor Policy, Inc., of Counsel), *for Plaintiffs-Appellants.*

LAWRENCE GOLD, Washington, DC (James Coppess, George Kaufmann, Washington, DC; Jordan Rossen, Michael Nicholson, Detroit, MI, of Counsel), *for Defendants-Appellees.*

PRATT, *Circuit Judge*:

Alleging violations of their first amendment speech and associational and fifth amendment due process rights, as well as a breach by their union of its duty of fair representation, appellants sought relief from paying full dues and fees under a union security clause contained in

the collective bargaining agreement between their employer and their union. The district court denied appellants' request for a preliminary injunction, finding that they had failed to show either irreparable injury or likelihood of success on the merits. Following this, appellants and the union each moved for summary judgment, and the employer moved to dismiss for failure to state a claim. The United States District Court for the District of Connecticut, M. Joseph Blumenfeld, *Judge*, granted the union's motion for summary judgment and the employer's motion to dismiss, and denied appellants' motion for summary judgment. We affirm the judgment of the district court, although for a different reason with respect to the duty of fair representation claim.

BACKGROUND

Appellants are employees of General Dynamics Corporation, Electric Boat Division, located in Groton, Connecticut, and are members of a bargaining unit of clerical and technical workers represented by the Marine Draftsmen Association, Local 571, UAW, AFL-CIO. Their allegations against their employer, their local union, and their international union arise out of a "union security", or "union shop", clause contained in the collective bargaining agreement negotiated between the employer and the union. Under this union security clause appellants, as members of the bargaining unit, were required, within 31 days after their employment commenced, to join the union and pay an amount equal to the union's initiation fee and, thereafter, monthly dues.

Shortly after the collective bargaining agreement was executed appellants informed the union that they wanted

a percentage reduction in their dues and fees because they objected to paying for political and ideological causes supported by the union. They claimed that those expenses were unrelated to the union's role as collective bargaining representative. Appellants contended that the forced payment of the full amount of dues and fees violated their first amendment speech and associational rights and their fifth amendment due process rights, and constituted a breach of the union's statutory duty of fair representation. Moreover, they asserted that the procedure prescribed by their international union to rebate dues and fees expended for political purposes was inadequate.

Pursuant to the collective bargaining agreement, the union warned appellants that it would seek their discharge if they failed to pay in full, and the employer, as it was contractually obligated to do, notified appellants that they would be terminated for nonpayment. Rather than risk discharge, appellants have paid their dues and fees in full pending resolution of this litigation.

DISCUSSION

A. *Appellants' Constitutional Claims.*

The viability of appellants' first and fifth amendment claims hinges upon the existence of government action, often called "state action", for without it, the union shop clause would be simply the product of negotiations between private parties. "Careful adherence to the 'state action' requirement preserves an area of individual freedom by limiting the reach of federal law and federal judicial power." *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 936 (1982). The district court rejected appellants' assertion that, like section 2, Eleventh of the Railway

Labor Act, 45 U.S.C. § 152, Eleventh (1982), section 8(a)(3) of the National Labor Relations Act, 29 U.S.C. § 158(a)(3) (1982), establishes the requisite government action to support their constitutional claims. *See Price v. International Union*, 621 F. Supp. 1243, 1248-49 (D. Conn. 1985). We agree with the district court that government action is absent here.

Appellants, whose labor relations are governed by the National Labor Relations Act (NLRA), rely heavily on *Railway Employes' Department v. Hanson*, 351 U.S. 225 (1956), and a subsequent line of cases decided under the Railway Labor Act (RLA), *see International Association of Machinists v. Street*, 367 U.S. 740 (1961); *Brotherhood of Railway and Steamship Clerks v. Allen*, 373 U.S. 113 (1963); *Ellis v. Brotherhood of Railway, Airline and Steamship Clerks*, 466 U.S. 435, 104 S. Ct. 1883 (1984); *see also Abood v. Detroit Board of Education*, 431 U.S. 209 (1977), for their claim that government action exists here.

Hanson involved a suit by railroad employees alleging violations of their first and fifth amendment rights and seeking to enjoin their employer and several unions from enforcing a union shop agreement. Writing for the Court, Justice Douglas noted that the RLA had been amended to allow for the inclusion of union shop agreements notwithstanding the contrary law of any state. 351 U.S. at 228-31. Section 2, Eleventh of the RLA provides, in pertinent part:

> Notwithstanding any other provisions of this chapter, or of any other statute or law of the United States, or Territory thereof, or of any State, any carrier or carriers as defined in this chapter and a labor organization or labor organizations duly designated and

> authorized to represent employees in accordance with the requirements of this chapter shall be permitted—
>
> (a) to make agreements, requiring, as a condition of continued employment, that within sixty days following the beginning of such employment, or the effective date of such agreements, whichever is the later, all employees shall become members of the labor organization representing their craft or class * * *.

45 U.S.C. § 152, Eleventh (1982). As this provision offered a means to override the law of 17 states at the time—including that of Nebraska, which had a right-to-work law inconsistent with § 2, Eleventh—the *Hanson* Court found government action. 351 U.S. at 232. "If private rights are being invaded, it is by force of an agreement made pursuant to federal law which expressly declares that state law is superseded. * * * The enactment of the federal statute authorizing union shop agreements is the governmental action on which the Constitution operates, though it takes a private agreement to invoke the federal sanction." *Id.* Nevertheless, despite the presence of government action, the *Hanson* Court found no impairment of first or fifth amendment rights in the mere inclusion of a union shop clause, although the Court left open the question of whether the imposition of other conditions would invade protected rights. *Id.* at 238.

Street and *Allen* probed beyond the *Hanson* Court's approval of the facial validity of § 2, Eleventh, by addressing specific challenges to the use of dues to support political purposes. *See Street*, 367 U.S. at 742-46; *Allen*, 373 U.S. at 115-18. In both instances, the Court did not base its decisions on the constitution, but relying on the statute, § 2, Eleventh, denied the union the right to use

dues for such purposes against a member's wishes. *Street*, 367 U.S. at 768-69; *Allen*, 373 U.S. at 118 & n.5. In *Ellis*, airline employees objected to paying that portion of their dues that related to expenditures by their union for conventions, litigation unrelated to collective bargaining, union publications, social functions, and union organization. 104 S. Ct. at 1888. The *Ellis* Court held that the expenditures for conventions, social functions, and publications were authorized by the RLA, but that the costs of organizing efforts and litigation unrelated to collective bargaining were outside the authorization of the RLA. *Id.* at 1892-97.

Appellants here contend that government action is present whenever congress authorizes the use of union security agreements, and argue that § 2, Eleventh, as interpreted in *Hanson* and its progeny, is indistinguishable from § 8(a)(3) of the NLRA. There, congress directed that:

> (a) It shall be an unfair labor practice for an employer—
>
> (3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: *Provided*, That nothing in this subchapter, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization * * * to require as a condition of employment membership therein * * *.

29 U.S.C. § 158(a)(3) (1982). Appellants would have us analogize this provision of the NLRA with § 2, Eleventh of the RLA on the ground that both do no more than authorize the use of union shop clauses. We note that we

have previously declined to decide whether there is a distinction for purposes of government action between § 8(a)(3) and § 2, Eleventh. *See Buckley v. American Federation of Television and Radio Artists*, 496 F.2d 305, 309-10 (2d Cir.), *cert. denied*, 419 U.S. 1093 (1974).

The fourth circuit, in *Beck v. Communications Workers of America*, 776 F.2d 1187, 1197-98 (4th Cir. 1985) (*pet. for reh'g in banc granted*), recently sought to harmonize the construction of these two statutes, stating: "As is obvious, it would be difficult, if not impossible, to find two statutes more identical in language and legislative purpose than section 8(a)(3) of the NLRA and section 2, Eleventh of the RLA." *Id.* at 1197. We respectfully disagree with the *Beck* majority's analysis of this issue.

The Supreme Court has enunciated the following approach for analyzing whether government action exists:

> First, the deprivation [of a federal right] must be caused by the exercise of some right or privilege created by the State or by a rule of conduct imposed by the state or by a person for whom the State is responsible. * * * Second, the party charged with the deprivation must be a person who may fairly be said to be a state actor.

Lugar, 457 U.S. at 937. Recognizing that the RLA's preemption of contrary state law was the heart of the *Hanson* Court's finding of government action, the District of Columbia circuit, in *Kolinske v. Lubbers*, 712 F.2d 471 (D.C. Cir. 1983), emphasized that:

> Because the federal statute did more than merely authorize the use of a union shop clause and allowed a private agreement to override contrary state law, the constitutional deprivation alleged by the plaintiff

in *Hanson* was caused by the exercise of some *right or privilege* created by the government.

Id. at 476 (citing *Lugar*, 457 U.S. at 936). The NLRA, however, contains no similar preemption of state law, *see id*; rather, the NLRA is merely permissive because it does no more than authorize a union shop in the *absence* of contrary state law, *see Reid v. McDonnell Douglas Corp.*, 443 F.2d 408, 409-11 (10th Cir. 1971). Section 14(b) of the NLRA expressly recognizes that states may preclude that statute's union shop authorization by contrary legislation. *See* 29 U.S.C. § 164(b) (1982).

The *Beck* majority reasoned, however, that there is no distinction on this ground because an agency shop clause under either statute is necessarily permissive insofar as it cannot exist without the agreement of the parties. 776 F.2d at 1206; *see also Linscott v. Millers Falls Co.*, 440 F.2d 14, 16 (1st Cir.) ("If federal support attaches to the union shop if and when two parties agree to it, it is the same support, once it attaches, even though the consent of a third party, the state, is a pre-condition"), *cert. denied*, 404 U.S. 872 (1971).

Although it is true that a union security clause cannot exist absent agreement by the parties, that is not determinative of the existence of government action, for the critical distinction is that, given that agreement by the parties is a prerequisite under both statutes, the states are precluded from outlawing union shops under the RLA and are not similarly precluded under the NLRA. By authorizing the inclusion of union shop clauses subject to the whim of the states, the NLRA allows private parties to do nothing more than what they could have agreed to do without the NLRA. The RLA, on the other hand, goes further and creates a federal right or privilege that enables

private parties to override state right-to-work laws. "[T]he existence of a permissive, but not compulsory, federal statute which may be preempted by contrary state law does not establish that the federal government is the source of authority for the clause." *Price*, 621 F. Supp. at 1249.

The *Beck* court also based its finding of government action on the fact that unions would not have the power to act as the exclusive bargaining representative of employees without the authorization of the federal labor statutes. *See Beck*, 776 F.2d at 1207-08. Nevertheless, the naked fact that a private entity is accorded monopoly status is insufficient alone to denominate that entity's action as government action. *See Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 351-52 (1974); *see also Beck*, 776 F.2d at 1222 (Winter, *J.*, dissenting). Thus, the first aspect of the *Lugar* test for government action is not satisfied here where no right or privilege created by the government is the source of the appellants' alleged deprivation.

Moreover, neither the employer nor the union here can be said to be a state actor. Under *Lugar*, a person may be said to be a state actor "because he is a state official, because he has acted together with or has obtained significant aid from state officials, or because his conduct is otherwise chargeable to the State." 457 U.S. at 937. Unlike the situation in *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977), where local government employees were subject to an agency shop agreement negotiated by their union and their governmental employer, here no government official was involved. Further, no significant aid from government officials has been demonstrated, nor, as was explained in *Kolinske*, has the

government injected itself in any other way so as to make the conduct here chargeable to the state. *See* 712 F.2d at 479-80; *see also Blum v. Yaretsky*, 457 U.S. 991, 1004 (1982) ("a State normally can be held responsible for a private decision only when it has exercised coercive power or has provided such significant encouragement, either overt or covert, that the choice must in law be deemed to be that of the State").

Thus, in enacting the NLRA congress mapped out the background and parameters of possible private action, but required nothing with respect to the particular wrong complained of here. When a private party makes the ultimate choice within a range of options offered by the government, state action generally is not implicated. *See Flagg Brothers, Inc. v. Brooks*, 436 U.S. 149, 164-65 (1978). Since the union security clause was a product of private negotiations and was not attributable to the government, appellants' constitutional challenges were properly dismissed for lack of government action.

B. *Duty of Fair Representation.*

We note initially that there is a question under *Clayton v. International Union*, 451 U.S. 679 (1981), whether appellants should have been required to exhaust their internal union remedies before bringing this action alleging a breach of the duty of fair representation. *Clayton* held that "courts have discretion to decide whether to require exhaustion of internal union procedures." *Id.* at 689.

Section 7 of the Constitution of the International Union here provides that "[a]ny member shall have the right to object to the expenditure of a portion of her/his dues money for activities or causes primarily political in

nature", and prescribes a procedure for obtaining a rebate. Appellants completely bypassed this procedure, claiming that it was inadequate to redress their constitutional and statutory rights. Although in light of section 7 exhaustion may have been appropriate, at least with respect to the union's challenged political expenditures, in view of the disposition we have reached in this case we find it unnecessary to determine here the full reach of the exhaustion requirement. Appellants have contested more than just political expenditures by the union; they also object to being compelled to pay for nonpolitical expenditures such as litigation expenses unrelated to collective bargaining, union organization and recruitment expenditures, union insurance plans, strike funds, scholarship funds, and union publications.

Appellants assert that the union breached its duty of fair representation in several ways: first, by negotiating and executing the provision for a union security clause; second, by enforcing the security clause against members to compel full payment of dues and fees under threat of discharge; and third, by spending the compelled payments for purposes appellants find objectionable. Appellees, on the other hand, argue that the entire claim should be viewed as merely an internal union matter, and that such matters have been judicially excluded from the duty of fair representation. *See, e.g., Kolinske*, 712 F.2d at 481.

A union's duty of fair representation is implied from § 9(a) of the NLRA, 29 U.S.C. § 159(a) (1982), which grants unions exclusive representational status over members of the relevant bargaining unit. *See Kolinske*, 712 F.2d at 481; *see also DelCostello v. International Brotherhood of Teamsters*, 462 U.S. 151, 164 n.14 (1983). When the statutory duty of fair representation arises, it is

breached only when the "union's conduct toward a member of the collective bargaining unit is arbitrary, discriminatory, or in bad faith." *Vaca v. Sipes*, 386 U.S. 171, 190 (1967).

Since the scope of the duty is derived from the union's status as exclusive representative of the employees to the employer, *see Steele v. Louisville & N.R. Co.*, 323 U.S. 192, 202-03 (1944), the duty of fair representation can arise only when all three parties are involved. That is, "the duty of fair representation is co-extensive only with the power of exclusive representation." *Kolinske*, 712 F.2d at 481; *see Bass v. International Brotherhood of Boilermakers*, 630 F.2d 1058, 1062-63 (5th Cir. 1980). Given this, "[i]f a union does not serve as the exclusive agent for the members of the bargaining unit with respect to a particular matter, there is no corresponding duty of fair representation." *Freeman v. Local Union No. 135*, 746 F.2d 1316, 1321 (7th Cir. 1984). Consequently, a matter that involves only the relationship between the union and its members and does not also involve the employer is viewed as an internal union matter that does not give rise to a duty of fair representation.

The principle that internal union matters are not encompassed within the duty of fair representation is exemplified in *Kolinske*. There, the union and the employer had negotiated a collective bargaining agreement containing an agency shop clause. When the union struck the employer, both members and nonmembers were eligible to receive strike benefits from the union if they took part in certain strike activities. Kolinske refused to do anything more than honor the picket line and was, therefore, denied strike benefits.

In Kolinske's subsequent suit the district court held that the union had breached its duty of fair representation. On appeal, however, the District of Columbia circuit court reversed, holding that "the duty of fair representation extends only to matters involving an employee's dealings with his employer and ordinarily does not affect an employee's relationship with the union structure." 712 F.2d at 481. The court noted that the National Labor Relations Board and the courts usually do not include internal union matters among matters deemed to affect employment, except in situations in which that internal matter would have a substantial impact on the employee's relationship with the employer. Because the strike benefit rules of the union did not have such a substantial impact on Kolinske's relationship with his employer, they were held to be an internal union matter and not within the ambit of the statutory duty of fair representation.

Analogizing to *Kolinske*, the district court here held that the controversy over the use of dues and fees to support certain political and ideological causes is a purely internal matter. *See Price*, 621 F. Supp. at 1251. Appellants argue, however, that this is not a purely internal union matter because the employer is involved to the extent that, under the collective bargaining agreement, the employees will be fired if they do not pay. They contend that when an employee stands to lose his job the matter cannot be classified as merely an internal union matter.

The union counters that how it chooses to spend its funds is entirely an internal decision. However, in order to decide this case, we need not answer this question of classification because, even assuming that appellants' complaint over the union's use of their forced dues and

fee payments did not qualify as an internal union matter and therefore would be subject to the duty of fair representation, there is nothing in the record—other than conclusory allegations by appellants—to show a breach of that duty; that is, that the union acted arbitrarily, discriminatorily, or in bad faith either in negotiating, executing, or enforcing the security clause, or in spending the resultant funds.

Undoubtedly, the mere negotiation of such a clause does not breach the duty of fair representation. Congressional authorization of such clauses in both § 2, Eleventh and § 8(a)(3) makes clear that they are properly part of our national labor policy. It strains logic to suggest that the union breached its duty of fair representation by negotiating into the collective bargaining agreement a statutorily authorized provision. Moreover, the Supreme Court has upheld the validity of a union shop clause under § 2, Eleventh, *see Hanson*, 351 U.S. at 238; and, if such a clause is facially proper under § 2, Eleventh, which empowers private parties to override contrary state law, *a fortiori* it is valid under § 8(a)(3), which does not accord any similar power to override state law. Therefore, in the absence of some special circumstance not present, or even suggested, here, a union cannot be said to have acted arbitrarily, discriminatorily, or in bad faith merely because it has successfully negotiated a union security clause.

Similarly, the union cannot be said to have breached its duty of fair representation because it seeks to enforce the union security clause it has successfully negotiated. It would be absurd to suggest that parties to a collective bargaining agreement could negotiate but then could not enforce such a provision.

The sole remaining issue, then, is whether there is some breach of the union's duty of fair representation when it spends the compelled payments for purposes not approved by the appellants. We have adopted the standard that "a union may breach the statutory duty by arbitrary or irrational conduct, even in the absence of bad faith or hostility in the form of ill will or common law *malitia*". *Ryan v. New York Newspaper Printing Pressmen's Union*, 590 F.2d 451, 455 (2d Cir. 1979). Applying that test to these expenditures, there is nothing to suggest arbitrary or irrational conduct by the union. The union's expenditures on organization and recruitment, insurance plans, strike funds, scholarship funds, union publications, and litigation unrelated to collective bargaining are for activities regularly engaged in by modern unions. Since unions ordinarily and routinely spend money for those things that appellants contest, it is not arbitrary for this union to fund such activities despite appellants' objections.

Furthermore, there is no claim here that these expenditures were motivated by any discriminatory animus. Appellants do not allege that they are being treated differently from other union members, *cf. Jones v. Trans World Airlines, Inc.*, 495 F.2d 790, 797-98 (2d Cir. 1974); on the contrary, their contention is that, in this instance, they *should* be treated differently because they disagree with the views of those who joined the union voluntarily rather than under the compulsion of the union security clause. Without some showing of discriminatory animus, however, resolution of internal disagreements on how union funds should be spent does not implicate the duty of fair representation.

Finally, there is no indication that the union acted in subjective bad faith in spending monies from an account to which appellants have contributed. Indeed, appellants' conclusory claim of bad faith is undercut, at least in part, by the fact that the international union has established a procedure for refunding to appellants and any other objectors monies spent on primarily political causes. Without deciding whether that particular procedure would be constitutionally adequate if government action had been found here, *see Ellis*, 104 S. Ct. at 1892-96, we note that the union's rebate program, at a minimum, tends to negate any inference of bad faith.

Hence, even assuming the statutory duty of fair representation applies here, appellants' claims do not establish that the union breached that duty. The judgment of the district court is therefore affirmed.

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a stated term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse, in the City of New York, on the 24th day of September on thousand nine hundred and eighty-six.

Robert Price, et al.,
Plaintiffs-Appellants,

-against- No. 85-7408

International Union, United Automobile Aerospace and Agricultural Implement Workers of America, et al.,
Defendants-Appellees.

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by counsel for the plaintiffs-appellants, Robert Price, et al.,

Upon consideration by the panel that heard the appeal, it is

Ordered that said petition for rehearing is DENIED.

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges of the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

/s/ Elaine B. Goldsmith

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

ROBERT PRICE, ET AL. :

v. : CIVIL NO. H-84-1221

INTERNATIONAL UNION, UNITED: AUTOMOBILE AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, MARINE DRAFTSMEN ASSOCIATION, : LOCAL 571, UAW, AFL-CIO and ELECTRIC BOAT DIVISION, : GENERAL DYNAMICS CORPORATION :

RULING ON PENDING MOTIONS

I. Facts

This action is brought by employees of the General Dynamics Corporation, Electric Boat Division, against their employer, their local union (defendant Marine Draftsmen Association-UAW, Local 571), and their international union.[1] Plaintiffs are members of a clerical and technical workers bargaining

[1]For convenience, the union defendants will be referred to hereinafter as "the union."

unit represented by the union. The collective bargaining agreement between General Dynamics and the union includes a "union security" clause which requires all employees in the bargaining unit to join the union within 31 days of their employment.[2] Pursuant to this clause, the union can demand the discharge of any member of the bargaining unit who fails to pay dues and initiation fees to the union, and General Dynamics would be subject to suit for breach of the contract if it failed to discharge such an employee.

Plaintiffs here have complied with the union security clause, but have also informed the union that they protest the payment of any amounts which the union will expend for purposes other than

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[2]Such a clause is commonly referred to, and will be referred to hereinafter, as a "union shop" clause.

collective bargaining or contract administration related to this bargaining unit (e.g., expenditures in support of candidates for public office). The union, however, insists that plaintiffs pay their dues and initiation fees in full, and has informed the plaintiffs that it will seek discharge of any member of the bargaining unit who refuse to pay. The union has also informed plaintiffs of a procedure provided by the constitution of the International, pursuant to which plaintiffs may seek a rebate of that portion of their dues which the union spends on political causes which plaintiffs find objectionable.

Plaintiffs contend that the union's insistence on full payment of dues and fees violates their first amendment speech and associational rights, fifth amendment due process rights, and statutory right to fair representation.

They sought a preliminary injunction, which was denied by this court on December 21, 1984 on the grounds that plaintiffs had shown neither irreparable injury nor a likelihood of success on the merits. Several motions are currently pending.

II. Plaintiffs' Motion to Amend Complaint

Plaintiffs' original complaint was brought by Robert Price and Timothy Sullivan, "on behalf of themselves and all others similarly situated," and included class-action allegations. A "motion to maintain class action" was also filed. On December 13, 1984, the court granted a motion to amend the complaint, adding 250 additional plaintiffs. Plaintiffs have now moved to amend the complaint a second time.

The proposed amended complaint drops the class allegations, and clarifies certain other aspects of plaintiffs'

claims. The union objects to the amendment, contending that it interferes with the briefing schedule established by the court at the hearing on December 21, 1984. That schedule required the union to file a motion to dismiss the complaint, or in the alternative for summary judgment on January 14, 1985, the very day that plaintiffs filed their motion for leave to amend. It is impossible, the union claims, to respond to a complaint by moving for its dismissal when on the day the dismissal motion is due to be filed defendants receive an amended complaint.

The court's examination of the proposed amended complaint has discovered no prejudice to be suffered by defendants if the amendment is allowed. Under Fed. R. Civ. P. 15(a), leave to amend shall be "freely given when justice so requires." Amplification of previously alleged

claims is one of the clearest cases for leave to amend. 3 Moore's Federal Practice ¶ 15.08[3] (1984). Accordingly, plaintiffs' motion to amend the complaint if granted.

III. Motion to Strike

In connection with their motion for summary judgment, discussed below, plaintiffs filed a "statement of material facts as to which there is no genuine issue to be tried," as required by Local Rule of Civ. P. 9(c). The union has moved to strike this statement on two grounds. First, plaintiffs' statement includes exhibits which are not referred to in any affidavit filed by plaintiffs, and are not authenticated, sworn or certified copies as required by Fed. R. Civ. P. 56(e). Second, plaintiffs' statement consists in substantial part of conclusory factual allegations and legal

contentions, also in contravention of Rule 56.

Plaintiffs' statement and exhibits are vulnerable to this attack. On a motion for summary judgment, a court may not consider materials that would not be admissible in evidence at trial, and the exhibits of course would not be admissible without some form of authentication. See 6 Moore's Federal Practice ¶ 56.11[1.-8] (1983) and cases there cited; Fed. R. Evidence 901. Moreover, the conclusory allegations and legal contentions contained in plaintiffs' statement are not what is contemplated by Local Rule 9(c).

However, the court does not find it necessary to strike plaintiffs' statement and exhibits. Among the latter, some are duplicative of other exhibits already in the record, and others are irrelevant to the issues raised by the motions for

summary judgment. The court is able to accord the various submitted the weight they deserve, and can adequately separate factual from non-factual allegations. Defendants' motion to strike is therefore denied.

IV. Motions for Summary Judgment

The plaintiffs and the union defendants have each moved for summary judgment. Both parties have filed statements of material facts not in issue, as required by Local Rule of Civ. P. 9(c). Although these statements do not agree in every particular, the material facts necessary for disposition of the case, discussed above in Part I of this Ruling, are not in dispute. I therefore find that summary judgment is appropriate. See Fed. R. Civ. P. 56.

A. The Issue of Government Action

The parties agree that, in order to prevail on their constitutional claims,

plaintiffs must establish governmental involvement in the denial of their constitutional rights. The first and fifth amendments provide protection only against governmental action. Hudgens v. NLRB, 424 U.S. 507, 513 (1976) (first amendment); Public Utilities Commission v. Pollak, 343 U.S. 451, 461 (1952). As plaintiffs characterize the issue, "the scope of the legislative grant of power to the MDA/UAW to compel payment [of 100% of dues and fees] under threat of federally-enforced termination . . . makes this action fairly attributable to the government . . . ." Plaintiffs' Memorandum in Support of Summary Judgment at 3. The defendants contend that "state action is not present in the conduct of the Defendants in negotiating and applying a union security clause valid under the National Labor Relations Act and under applicable state law, and in

UAW's expenditure of dues or fees collected under such a clause." UAW's Memorandum in Opposition to Motion for Preliminary Injunction at 3 (incorporated by reference in union defendants' Memorandum in Support of Motion to Dismiss or, in the Alternative, for Summary Judgment). Whether the conduct at issue is the insistence on full payment, the negotiation and enforcement of the union security clause, or the expenditure of dues and fees, if the conducts is not "fairly attributable to the state," Lugar v. Edmondson Oil Co., 457 U.S. 922, 937 (1982), defendants are entitled to judgment as a matter of law.

In Lugar, the Supreme Court established a two-part approach to the question of "fair attribution."

> First, the deprivation must be caused by the exercise of some right or privilege created by the state or by a rule of conduct imposed

> by the State or by a person for whom the state is responsible. . . . Second, the party charged with the deprivation must be a person who may fairly be said to be a state actor. This may be because he is a state official, because he has acted together with or has obtained significant aid from state officials, or because his conduct is otherwise chargeable to the State. Without a limit such as this, private parties could face constitutional litigation whenever they seek to rely on some state rule governing their interactions with the community surrounding them.

1. Was there a government-created right or privilege?

The Court of Appeals for the District of Columbia Circuit has recently applied the Lugar analysis to a union's use of fees collected under an "agency shop clause" which is analogous, although not identical, to the union security clause

at issue here.[3] Kolinske v. Lubbers, 712 F.2d 471, 477-80 (D.C. Cir. 1983). the court held that the first part of the Lugar test was not satisfied, stating:

> In employing the two-part test outlined in Lugar, we must first determine whether the agency shop clause and the attendant restrictions in strike benefits funded in part by those agency fees constitute an exercise of "some right or privilege created by the state or by a rule of conduct imposed by the state or by one for whom the state is responsible." Lugar, 457 U.S. at 937. In no sense is the agency shop clause compelled by federal law. Appellee cites no law, and our review of the NLRA fails to disclose any federal law, that forces the union and the company to adopt that provision as part of their labor ccntract. We are left with the question whether the authorization provided the agency shop clause by

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[3]Under an "agency shop" clause, all members of the bargaining unit must pay dues and fees to the union, but are not required to become members.

section 8(a)(3) of the NLRA[4] makes the clause an exercise of a right or privilege created by the state or one for whom the state is responsible. We conclude that it does not.

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[4]Section 8(a)(e) of the National Labor Relations Act, 29 U.S.C. § 158(a)(3) (1982), provides in pertinent part:

> (a) It shall be an unfair labor practice for an employer--
>
> (3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: Provided, That noting in this subchapter, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization . . . to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later . . . .

The district court held the agency shop clause to be state action because such clauses are "expressly authorized" by Congress, and consequently, the use of such fees was subject to constitutional scrutiny. But it is well settled that a state's mere authorization of private conduct does not justify a finding of state action. Blum v. Yaretsky, 457 U.S. 991, 1004 (1982); Jackson v. Metropolitan Edison Co., 419 U.S. 345, 354 (1974). While the NLRA provides a framework to assist employees to organize and bargain collectively with their employers, the NLRA is neutral with respect to the content of particular agreements. See NLRA § 8(d), 29 U.S.C § 158(d); Local 24, International Brotherhood of Teamsters v. Oliver, 358 U.S. 283, 294-95 (1959). The NLRA does not mandate the existence or content of, for example, seniority clauses, work rules, staffing requirements, or union security provisions like agency shop clauses or mandatory payroll deductions for union dues. Even though federal law provides an encompassing umbrella of regulation, the parties, like any two

> parties to a private contract, were still free to adopt or reject an agency shop clause with or without government approval. Thus, the authorization for agency shop clauses provided by NLRA section 8(a)(3) does not transform agency shop clauses into a right or privilege created by the state or one for whom the state is responsible.

Kolinske, 712 F.2d at 477-78 (original footnote and citations omitted, new footnote added). See Hovan v. United Brotherhood of Carpenters and Joiners, 704 F.2d 641 (1st Cir. 1983) (no governmental action involved where union refuses membership to one who will not take oath).

Plaintiffs believe Kolinske was wrongly decided. They argue that section 8(a)(3)'s explicit authorization of union security provisions such as the one at issue here embodies a strong federal policy designed to promote labor peace by

eliminating the "free rider" problem, and that it is part of a statutory scheme which encourages unions and employers to enter into such agreements. Moreover, should the employer breach such a union security agreement, the union may avail itself of the assistance of the federal courts and the National Labor Relations Board in enforcing the contract. Plaintiffs contend that if viewed in this context, the union's demand, pursuant to the union security clause of the contract, that plaintiffs pay full dues and fees, carries enough of a federal imprimatur to be considered the exercise of a "right or privilege created by the government."

Section 8(a)(3)'s authorization of union shop clauses, however, creates no right or privilege. In fact, as amended by the Taft-Hartley Act in 1947, the statute prohibits closed shop clauses,

which previously had been permitted.[5] Neither the original language of section 8(a)(3), which permitted closed shop clauses, nor the 1947 amendment, which prohibits closed shops but permits union shops, seeks to impose any particular form of union security clause on labor or industry. See Algoma Plywood Co. v. Wisconsin Employment Relations Board, 336 U.S. 301, 314 (1949). Moreover, section 14(b) of the National Labor Relations Act, 29 U.S.C. § 164(b), allow any state to prohibit union shop agreements. Thus section 8(a)(3), properly viewed, does no more than disclaim any federal policy toward union security clauses. Such clauses will be enforced if state law permits it, and will not be enforced if state law prohibits their enforcement.

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[5]A "closed shop" clause makes union membership a precondition of employment in the bargaining unit.

No federal right or privilege is created by such a statute.[6]

The foregoing discussion makes it clear that plaintiffs' reliance on cases decided under section 2, Eleventh of the Railway Labor Act, 45 U.S.C. § 152 Eleventh, is misplaced.[7] In the leading

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[6]For an argument that the courts should no find union conduct subject to constitutional review, which relies in part on the distinction between statutes which "command" and those which "permit," see Wellington, The Constitution, The Labor Union, and "Governmental Action," 70 Yale L.J. 345 (1961). Professor (later Dean) Wellington contends that the task of regulating union conduct is best left to Congress, which can regulate by statute after full consideration of policy options.

[7]Section 2, Eleventh of the Railway Labor Act, 45 U.S.C. § 152 Eleventh (1982), provides in pertinent part:

> Notwithstanding any other provisions of this chapter, or of any other statute or law of the United States, or Territory thereof, or of any State, any carrier or carriers as defined in this chapter and a labor organization or
>
> (continued...)

case, Railway Employees' Dept. v. Hanson, 351 U.S. 225 (1956), the Court held that a union shop agreement made pursuant to section 2, Eleventh did not infringe the first or fifth amendment rights of workers who sought to avoid joining the union. In order to reach the merits, the Court necessarily found the presence of government action, but that finding rested explicitly on the statutory

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[7](...continued)
labor organizations duly designated and authorized to represent employees in accordance with the requirements of the chapter shall be permitted--

(a) to make agreements, requiring, as a condition of continued employment, that within sixty days following the beginning of such employment, or the effective date of such agreements, whichever is the later, all employees shall become members of the labor organization representing their craft or class: . . . .

language superseding contrary state law. Id. at 232. "In other words, the federal statute is the source of the power and authority by which any private rights are lost or sacrificed." Id. (footnote omitted). In contrast, union security agreements permitted by section 8(a)(3) of the National Labor Relations Act must give way in the face of contrary state law. Thus, the federal statute is not "the source of power and authority" for such agreements.

Hanson's progeny includes International Association of Machinists v. Street, 367 U.S. 740 (1961), Railway Clerk v. Allen, 373 U.S. 113 (1963), and Ellis v. Railway Clerks, ___ U.S. ___, 52 U.S.L.W. 4499 (1984). In each of these cases, the Court confronted a challenge by union members to particular uses of their union dues. In each case, the Court held that unions are prohibited from using funds

collected from a member for political purposes to which the member expressly objects. But the Court explicitly rested these decision on Section 2, Eleventh of the Railway Labor Act, and not on the Constitution. Thus there was no need to consider whether the collection of fees and dues, pursuant to a statutorily-authorized union security clause, for proscribed purposes, constituted state action, and the Court expressed no opinion on this question. Likewise inapposite is Abood v. Detroit Board of Education, 431 U.S. 209 (1977), also relied upon by plaintiffs. In Abood, plaintiffs' employer was a governmental entity. Since the government was a party to the union security agreement at issue in the case, the Court never faced the state action question. The Court relied extensively on Hanson and Street in reaching the conclusion that the agency

shop clause at issue in Abood, which was authorized by a Michigan statute covering public sector collective bargaining, was not constitutionally offensive. But nothing the Court said in Abood indicated that it would extend the state action ruling of Hanson to non-Railway Labor Act cases.

I conclude, therefore, that Hanson and the cases following it do not require a finding that governmental action is present in the circumstances presented by this case. The union security clause contained in the contract among the defendants here is part of a privately bargained contract among private parties. That clause would be permissible if both state and federal law were silent about such clauses, and the existence of a permissive, but not compulsory, federal statute which may be preempted by contrary state law does not establish

that the federal government is the source of authority for the clause. Kolinske, 712 F.2d at 476-77. Accord Reid v. McDonnell Douglas Corp., 443 F.2d 408 (10th Cir. 1971).[8]

2. Was there a "government actor"?

Even if the conduct at issue here did rest on a government-created right or privilege, plaintiffs would have to show that the second part of the Lugar test--the requirement that defendant be a state actor--is satisfied. The court in

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[8]Before the decisions in Kolinske and Reid, two appellate courts had reached the opposite result in similar cases. Seay v. McDonnell Douglas Corp., 533 F.2d 1126 (9th Cir. 1976); Linscott v. Millers Falls Co., 440 F.2d 14 (1st Cir. 1971). Thus there is a conflict among the circuits on the governmental action issue in this case. The Court of Appeals for the Second Circuit has never reached the issue. See Buckley v. American Federation of Television and Radio Artists, 496 F.2d 305 (2d Cir.), cert. denied, 419 U.S. 1093 (1974). In the absence of binding authority in this circuit, I consider the reasoning of the decision in Kolinske to be persuasive.

Kolinske addressed this issue in some detail, 712 F.2d at 478-80, and found that the traditional indicia used to attribute private conduct to the state were not present. A similar analysis in the instant case leads to the same result.

There is no allegation here that the defendants perform a traditionally public function. Cf., e.g., Marsh v. Alabama, 326 U.S. 501 (1946). Nor do plaintiffs claim that the defendants conspired with state officials, or were coerced or encouraged by such officials. Cf. Adickes v. S.H. Kress & Co., 398 U.S. 144 (1970). Finally, the fact that the collective bargaining process and the behavior of unions are extensively regulated by the federal government does not make defendants "state actors" where the government has not compelled or significantly encouraged the challenged

conduct. Rendell-Baker v. Kohn, 457 U.S. 830 9182). The Supreme Court has held at least twice that union conduct is not state action. United Steelworkers v. Sadlowski, 457 U.S. 102, 121 n.16 (1982) (union rule prohibiting candidates for union office from accepting contributions from nonmembers does not contravene the first amendment because there is no state action); United Steelworkers v. Weber, 443 U.S. 193, 200 (1979) (collectively bargained affirmative action plan does not involve state action, and therefore does not present an alleged violation of the fourteenth amendment).

Plaintiffs also seek to bring this case within the doctrine of Shelley v. Kraemer, 334 U.S. 1 (1948), by referring to the threat of "federally-enforced" termination of employees who refuse to pay dues and fees in full. But Shelley is plainly distinguishable from the

instant case. In Shelley, the state court intervened in a private transaction between a willing seller and a willing buyer to enforce a racially restrictive covenant at the behest of a third party neighboring landowner. Here, by contrast, there has as yet been no court intervention. Thus far, the parties to the agreement have abided by it. A court's intervention to enforce the agreement will be called for only if the agreement is breached. Such intervention could occur in any suit on a contract. This possibility does not satisfy the state action criteria of Shelley or Lugar.

For the foregoing reasons, I conclude that the conduct challenged in this case is not conduct with is "fairly attributable 'to the government, and defendants' motion for summary judgment

must be granted as to plaintiffs' constitutional claims.

B. The Claim for Breach of the Union's Duty of Fair Representation

Plaintiffs state as an alternative ground for relief the claim that

> by negotiating the union security clause, demanding and obtaining 100% of dues and fees from plaintiffs under threat of discharge, and spending portions of those sums for costs other than for collective bargaining, the MDA/UAW is violating the statutory duty of fair representation owed to plaintiffs.

Plaintiffs' Memorandum at 30 (emphasis in original). The union's duty of fair representation, which arises from section 8(b) and 9(a) of the National Labor Relations Act, 29 U.S.C. §§ 158(b), 159(a), is breached "only when a union's conduct toward a member of the collective bargaining unit is arbitrary, discriminatory, or in bad faith." Vaca v. Sipes, 386 U.S. 171, 190 (1967). The

duty is "derived from a union's statutory right to be the exclusive representative of the members of a designated unit." Abrams v. Carrier Corp., 434 F.2d 1234, 1251 (2d Cir. 1970). The ordinary case under the doctrine is one in which a plaintiff contends that his union has failed to represent him adequately in processing a grievance against the employer or contesting a discharge. E.g., Vaca, supra.

As authority for the proposition that the union's conduct in the instant case violated its duty of fair representation, plaintiffs rely on the decision of the Ninth Circuit Court of Appeals in Seay v. McDonnel Douglas Corp., 427 F.2d 966 (1970), appeal after remand, 533 F.2d 1126 (1976). The court in Seay held that plaintiffs who contested the expenditure for political purposes of fees collected pursuant to an agency shop clause had

stated a claim for breach of the union's duty of fair representation. The court read into the collective bargaining agreement a requirement that agency fees be spent only on costs attributable to the bargaining unit. The court found this requirement implied in the "statute under the terms of which the collective bargaining agreement, with its agency fee provision, was entered into in [the] case." 427 F.2d at 1000. But although the agreement in Seay was governed by the National Labor Relations Act, the court based its holding on the Railway Labor Act cases discussed supra at pp. 10-12.

Defendants contend that Seay was wrongly decided, since the court in Seay ignored the differences between section 2, Eleventh of the Railway Labor Act and section 8(a)(3) of the NLRA. The court in Seay assumed that the two statutes were "for all purposes here, the same,"

427 F.2d at 1003, and that if the Railway Labor Act forbids the expenditure of agency fees for political purposes, the National Labor Relations Act must also forbid such expenditures.[9] The court also assumed, without elaboration of its rationale, that expenditures in violation of this rule would breach the duty of fair representation.

In my judgment, the court in Kolinske took a more persuasive approach to the claim that the conduct in issue here constitutes a breach of the union's duty of fair representation. The court stated:

> A union's duty of fair representation arises out of the exclusive

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[9]The Supreme Court has warned that "[e]ven rough analysis [between the Railway Labor Act and the National Labor Relations Act] must be drawn circumspectly, with due regard for the many differences between the statutory schemes." Railroad Trainmen v. Terminal Co., 394 U.S. 369, 383 (1969) (footnote omitted).

representational status granted a union by section 9(a) of the NLRA, 29 U.S.C. § 159(a) (1976). See Baker v. Newspaper & Graphic Communications Union Local 6, 628 F.2d 156, 165 (D.C. Cir. 1980). This section has been interpreted to mean that the union must "serve the interests of all [employees] without hostility or discrimination toward any, to exercise its discretion with complete good faith and honesty, and to avoid arbitrary conduct." Vaca v. Sipes, 386 U.S. 171, 177, 87 S.Ct. 903, 909, 17 L.Ed.2d 842 (1967) (citing Humphrey v. Moore, 375 U.S. 335, 342, 84 S.Ct. 363, 367, 11 L.Ed.2d 370 (1964). . . .

. . . Arising as it does out of a union's privilege under section 9(a) of the NLRA to serve as the employees' exclusive representative, the duty of fair representation is co-extensive only with the power of exclusive representation. As we have earlier noted, "a union . . . can be held to represent employees unfairly only in regard to those matters as to which it represents them at all--namely, 'rates of pay, wages, hours . . ., or other conditions of

> employment." International Brotherhood of Teamsters, Local No. 310 v. NLRB, 587 F.2d 1176, 1183 (D.C. Cir. 1978) (quoting 29 U.S.C. § 159(a) (1970) (emphasis in original) (footnote omitted); see also Miranda Fuel Co., Inc., 140 N.L.R.B. 181, 185 (1962) (duty of fair representation extends to matters affecting employment). In other words, the duty of fair representation extends only to matters involving an employee's dealings with his employer and ordinarily does not affect an employee's relationship with the union structure. Bass v. International Brotherhood of Boilermakers, 630 F.2d 1058 (5th Cir. 1980).

712 F.2d at 481 (emphasis added).

In the instant case, the controversy over the union's use of dues and fees is purely an internal union matter. There is no claim that the union has represented these plaintiffs inadequately or unfairly in any dealings with the employer. Indeed, the Supreme Court has

recently indicated that in order to prevail on a claim alleging breach of the union's duty of fair representation, the aggrieved employee must show both that the employer breached the collective bargaining agreement and that the union breached its duty to assist the plaintiff in seeking a remedy for the employer's breach. DelCostello v. International Brotherhood of Teamsters, ___ U.S. ___, 51 U.S.L.W. 4693, 4697 (1983). Although plaintiffs have made the employer a defendant in this case, they have alleged no breach of contract by the employer. I concluded that the plaintiffs have failed to show a breach by the union of its duty of fair representation.[10]

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[10]Were the conduct at issue in this case considered to come within the duty of fair representation doctrine, it is difficult to see what expenditure decisions by the union would not be subject to judicial review under the doctrine. In my view, it would be a

(continued...)

C. The Adequacy of the Union's Rebate Scheme

Plaintiffs have devoted a large portion of their memorandum to a contention that the union's rebate procedure for members who object to the expenditure of dues and fees for political purposes is inadequate. Were the adequacy of the rebate scheme a material issue in this case, summary judgment for either party would have been denied, since the operation of the procedure would raise contested questions of fact. Having decided, however, that plaintiffs' constitutional claims must fail for lack of governmental action, and that the

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[10](...continued)
mistake to give the duty of fair representation, which is a doctrine implied by the NLRB and the courts from the statute, such a broad reading. When Congress sought to regulate the internal affairs of union, it had no difficulty in enacting a statute designed specifically to do so. See the Labor-Management Reporting and Disclosure Act, 29 U.S.C. § 401 et seq. (1982).

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INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, *et al.*,
Respondents

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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MEMORANDUM OF THE RESPONDENTS

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MEMORANDUM OF THE RESPONDENTS

As we explain in detail below, the four questions presented in the petition for a writ of certiorari fall into two discrete categories: threshold questions pertaining to the merits of petitioners' claims (Questions 1 and 2) and questions of constitutional procedure and remediation (Questions 3 and 4).

As to the former category, we agree that the court of appeals' decision dismissing plaintiffs' complaint conflicts with the decision of the Fourth Circuit in *Beck v.*

Communications Workers, 800 F.2d 1280 (1985) (en banc), *pets. for cert. pending*, Nos. 86-627, 86-966, and that the conflict is over issues of profound importance that warrant resolution by this Court. Because the earlier filed certiorari petition in No. 86-627 seeking review of the *Beck* decision raises these issues, we believe that the instant petition does not warrant separate plenary consideration. Rather, the disposition of the first two questions here should follow on from the Court's disposition of the *Beck* case.

The lower courts did not decide the procedural/remedial questions plaintiffs attempt to raise as the third and fourth question presented in the certiorari petition in this case precisely because those courts dismissed plaintiffs' complaint on the merits. Accordingly, those questions are not ripe for resolution by this Court at this time. If the lower court's decision on the merits stands undisturbed, the remedial issues, of course, become academic; and if the lower court's decision on the merits were to be overturned, the remedial issues should be remanded for decision below.

1. This case arises out of a collective bargaining agreement between defendant-respondent International Union, United Automobile Aerospace and Agricultural Implement Workers of America ("UAW") and General Dynamics Corporation, Electric Boat Division. That agreement provides, *inter alia*, that all employees of General Dynamics employed in the bargaining unit for which the UAW is the exclusive representative, are, as a condition of continued employment in that unit, to pay to their bargaining representative, the UAW, an amount equal to union dues. Plaintiffs/petitioners are covered by the collective bargaining agreement and object to this union security requirement.

Plaintiffs commenced this action in federal district court alleging that the union security agreement, and its

enforcement, violate plaintiffs' rights under both the First Amendment and § 8(a)(3) of the National Labor Relations Act, 29 U.S.C. § 158(a)(3), and also constitute a breach of the UAW's duty of fair representation. The district court dismissed plaintiffs' complaint for failing to state a claim on which relief can be granted, and the Second Circuit affirmed. The court of appeals reasoned that: (i) because "the union security clause was a product of private negotiations and was not attributable to the government, plaintiffs' constitutional challenges were properly dismissed for lack of government action," Pet. App. xiv; (ii) given the absence of state action, there is no basis to read into NLRA § 8(a)(3) a prohibition on union security agreements, especially since that section in terms "makes clear that they [union security agreements] are properly part of our national labor policy," *id.* at xvii; and (iii) plaintiffs' contention that "they should be treated differently" than all other members of the bargaining unit by being exempted from the obligation to pay full union dues "does not implicate the duty of fair representation," *id.* at xix.

In the first two questions presented in their petition, and in the first three parts of their discussion of the reasons for granting the writ, plaintiffs seek review of the decision of the court of appeals on the three issues just outlined. Although we believe that the appellate court correctly resolved these issues, we agree that the Second Circuit's decision on these issues is in square conflict with the decision of the Fourth Circuit in *Beck*. In that decision the Fourth Circuit invalidated a union security agreement analytically indistinguishable from the one at issue here on precisely the grounds rejected by the Second Circuit in the instant case.

We also agree that the issues over which the Second and Fourth Circuits disagree are of profound practical and doctrinal importance. Accordingly, we believe these questions merit resolution by this Court.

In No. 86-627, *Communications Workers of America v. Beck*, the union whose agreement was invalidated in *Beck* has petitioned for review of the Fourth Circuit's decision. On December 8, 1986, the Court invited the Solicitor General to state the views of the United States with respect to that petition.

If the Court were to grant the union's petition in *Beck*, we believe the instant case should be held for *Beck* and the disposition of the first two questions raised here controlled by this Court's ultimate decision in *Beck*. Because the questions presented here and in *Beck* are pure questions of law, all of which are fully and fairly raised in the certiorari petition in No. 86-627, granting a writ of certiorari in this case as well as in *Beck* would, we believe, simply double the number of parties and briefs, without in any way aiding the Court in resolving the issues presented.[1]

2. If, contrary to the decision below, this Court eventually were to hold that the First Amendment, § 8(a)(3), or the duty of fair representation limits the prerogatives of unions and private employers to condition continued employment in a bargaining unit upon the payment of full union dues, a set of further questions would be raised as to the categories of expenditures for which financial support may be required, and the procedures to be used in drawing that line and in collecting monies from objecting employees.

In *Ellis v. Railway Clerks*, 466 U.S. 435 (1984), the Court addressed similar questions with respect to union security agreements negotiated in the airline industry; the Court did so because *Machinists v. Street*, 367 U.S.

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[1] If the Court were to consolidate this case with *Beck*, special procedures would be required for briefing and argument, because having prevailed in this case but lost in *Beck*, the union-defendants are respondents here and petitioners in *Beck*, whereas the objecting employees are petitioners here and respondents in *Beck*.

740 (1961), had earlier held that, in order to avoid "constitutional questions . . . of the utmost gravity," *id.* at 749, the Court would construe § 2, Eleventh of the Railway Labor Act, 45 U.S.C. 152, Eleventh, to limit a union's power to collect full dues from objecting employees. Similarly, in *Chicago Teachers v. Hudson*, —— U.S. ——, 54 L.W. 4231 (March 4, 1986), the Court considered procedural/remedial questions of the sort just noted with respect to union security provisions contained in agreements with a public employer, as such agreements unmistakably involve state action and hence are subject to the limitations of the First Amendment. *See Abood v. Detroit Board of Education*, 431 U.S. 209 (1977).

In the instant case, however, the lower courts rejected the plaintiffs' First Amendment claim for lack of state action, and found no limitation in § 8(a)(3) or in the duty of fair representation on the negotiation and enforcement of agreements requiring all members of a bargaining unit to pay full dues to the bargaining representative. Having so held, those courts had no occasion to address the lawfulness of the procedures followed by the Union here in collecting monies for plaintiffs, and in voluntarily rebating monies attributable to political expenditures to objecting employees.[2] As the district court stated:

> Were the adequacy of the rebate scheme a material issue in this case, summary judgment for either party would have been denied, since the operation of the procedure would raise contested questions of fact. Having decided, however, that plaintiffs' constitutional claims must fail for lack of governmental action, and that the claim for breach of the duty of fair representation must fail because the expenditure of dues and fees is a purely internal union matter,

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[2] Such a rebate procedure is provided for in the Union's Constitution. *See* Pet. App. xxiv.

> *I need not pass on the adequacy of the rebate scheme.* [Pet. App. 1v to 1vi; emphasis added] [3]

Notwithstanding the fact that the courts below, having dismissed plaintiffs' complaint on the merits, had no occasion to address the procedural/remedial issues, plaintiffs attempt to bring those issues before this Court in their third and fourth questions presented. And in Part IV of their discussion of the Reasons for Granting the Writ plaintiffs argue those issues at some length.

In no event are those questions properly raised at this time. If the appellate court's decision on the merits is left undisturbed—as we believe it should be—then the procedural/remedial issues would become academic; if, on the other hand, the dismissal of the complaint were to be reversed, then the procedural/remedial issues should be remanded to the lower courts for them to decide in the first instance.

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[3] The only reference to the questions noted in text in the court of appeals' opinion is the following paragraph discussing plaintiffs' fair-representation claim:

> Finally, there is no indication that the union acted in subjective bad faith in spending monies from an account to which appellants have contributed. Indeed, appellants' conclusory claim of bad faith is undercut, at least in part, by the fact that the international union has established a procedure for refunding to appellants and any other objectors monies spent on primarily political causes. *Without deciding whether that particular procedure would be constitutionally adequate if government action had been found here,* we note that the union's rebate program, at a minimum, tends to negate any inference of bad faith. [Pet. App. xx; emphasis added]

This reference to the Union's procedure hardly constitutes an "embrac[e] of the union's rebate procedure," Pet. at 31, and thus does not raise the question of whether the union's procedure is "statutorily and constitutionally adequate," Petition Question 4.

CONCLUSION

For the foregoing reasons, we submit that the petition in No. 86-627, *Communications Workers v. Beck* should be granted and the instant petition held for *Beck*.

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REPLY IN SUPPORT OF PETITION

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REPLY IN SUPPORT OF PETITION

Although respondents agree that the two categories of questions raised by the petition are important, they urge that certiorari not be granted now. Respondents' objections are insubstantial.

1. As to the "threshold questions pertaining to the merits of petitioners' claims (Questions 1 and 2)," respondents admit that the court of appeals' decision conflicts with *Beck v. Communications Workers*, 800 F.2d 1280 (4th Cir. 1986) (en banc), *petitions for cert. filed*, 55 U.S.L.W. 3317 (U.S. Oct. 17, 1986) (No. 86-

637), 55 U.S.L.W. 3454 (U.S. Dec. 11, 1986) (No. 86-966). Memorandum of Respondents at 1-2.[1] Respondents also agree "that the conflict is over issues of profound [practical and doctrinal] importance that warrant resolution by this Court." *Id.* at 2, 3. Consequently, this case deserves plenary review under the standards of Supreme Court Rule 17.1.

Nonetheless, respondents urge that a writ issue only in No. 86-637 in *Beck*, and that this petition be held pending decision in *Beck*, because of imagined procedural difficulties should certiorari be granted in both cases. The perceived case-handling problems are trivial, and respondents' suggestion disingenuous, given this Court's practice and the circumstances of these cases.

This Court occasionally grants review simultaneously in two cases presenting substantially the same issue and, pursuant to Rule 37.3, consolidates them for argument. In that event, the parties whose interests are aligned may, but need not, file a consolidated brief, but under Rule 38.4 normally must agree on one counsel to present argument. On other occasions, the Court simultaneously grants review in two similar cases and sets them for argument together, one immediately after the other or in tandem. In that event, briefs and arguments are not consolidated, but counsel should coordinate their efforts. *See* R. Stern, E. Gressman & A. Shapiro, *Supreme Court Practice* § 14.6 (6th ed. 1986).

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[1] The decision below also conflicts with *Beck v. Communications Workers*, 776 F.2d 187, 1205-09 (1985) (governmental action), *aff'd on reh'g on other grounds*, 800 F.2d 1280 (4th Cir. 1986); *Seay v. McDonnell Douglas Corp.*, 427 F.2d 996 (9th Cir. 1970) (duty of fair representation and, implicitly, governmental action); *Linscott v. Millers Falls Co.*, 440 F.2d 14, 16-17 (1st Cir. 1971) (governmental action.)

The petitioners/cross-respondents in *Beck* (the Communications Workers, *et al.*) and the respondents in this case (the Auto Workers, *et al.*) would have no difficulty in consolidating or coordinating their briefs and arguments, because their counsel of record is the same in both cases, here and in the courts of appeals. Although the respondents/cross-petitioners in *Beck* and the petitioners in this case are represented by different counsel of record, they have the same claims,[2] and their counsel have already cooperated here and below.

Moreover, in their petition in No. 86-637 in *Beck*, the Communications Workers argue that in this case the Second Circuit correctly determined the issues of law common to the cases. If, through their common counsel of record, the Auto Workers are thus able to present their case to the Court, fairness requires that petitioners be permitted to do so as well through their own counsel and on equal terms. That can occur only if review is granted in both cases and they are consolidated or scheduled for argument together.

2. As to the "procedural/remedial issues" presented in Questions 3 and 4 of the petition, respondents wrongly contend that "the courts below * * * had no occasion to address" them. Memorandum of Respondents at 6.

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[2] The only distinction between the cases as to Questions 1 and 2 is that the compulsory unionism agreement in *Beck* is an "agency shop," *see* 776 F.2d at 1189, while in this case it is a "union shop" that the court of appeals erroneously viewed as creating formal union membership, *see* App. vi, xiv-xx. That distinction, however, is an additional reason for reviewing both cases, so that this Court can settle the merits in both contexts, and can correct the court of appeals' failure to acknowledge the limited nature of the "membership" that can be required under the National Labor Relations Act, 29 U.S.C. §§ 151-169 (1982). *See Pattern Makers v. NLRB*, 105 S. Ct. 3064, 3071 & n.16 (1985).

True, the district court did "not pass on the adequacy of the rebate scheme." App. lvi. However, the court of appeals *did*, as a *statutory* (not constitutional) matter, and Questions 3 and 4 are ripe for review.

The Second Circuit held the Auto Workers entitled to summary judgment on petitioner employees' claim for breach of the duty of fair representation for two reasons. The court first found no breach of the duty of fair representation when a union spends compulsory payments of objecting employees for non-bargaining purposes. App. xix. It then held alternatively that, if such expenditures could breach the duty, the union's internal rebate scheme negated any claim of unfair representation:

> Without deciding whether that particular procedure would be *constitutionally* adequate if government action had been found here, we note that the union's rebate program, at a minimum, tends to negate any inference of bad faith.
>
> *Hence*, even assuming the *statutory* duty of fair representation applies here, *appellants' claims do not establish that the union breached that duty*. The judgment of the district court is *therefore* affirmed.

App. xx (citation omitted) (emphasis added).

The quoted language is no mere aside, as the Memorandum of Respondents suggests at page 6 note 3. It is a *holding* that the Auto Workers' rebate procedure, on its face, negates petitioners' statutory claim that the use of their compulsory dues for non-bargaining purposes breaches the duty of fair representation. That decision is clearly erroneous in light of *Ellis v. Railway Clerks*, 466 U.S. 435, 443-44 (1984), and *Teachers Local 1 v. Hud-*

son, 106 S. Ct. 1066 (1986). *See Beck v. Communications Workers*, 776 F.2d 1187, 1204 n.25 (1985), *aff'd on reh'g en banc*, 800 F.2d 1280 (4th Cir. 1986).

Plenary review of *Beck* will address the procedural/-remedial questions raised by this case only if the Court grants the employees' cross-petition (No. 86-966), as well as the union's petition (No. 86-637), in *Beck*. Even then those questions are not identical in the two cases, because the court-ordered rebate scheme in *Beck* differs substantially from the wholly intra-union (and more objectionable) scheme the Second Circuit sanctioned in this case. This Court should grant writs in both cases to declare both schemes statutorily and constitutionally inadequate and, thus, avoid future confusion among lower courts as to the procedural safeguards necessary to protect the speech and associational rights of nonunion employees.

* * *

CONCLUSION

For the foregoing reasons, as well as those urged in the petition, certiorari should be granted.[3]

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[3] The Court has invited the Solicitor General's views in No. 86-637, *Communications Workers v. Beck*, 107 S. Ct. 641 (1987) (mem.), and neither petition in *Beck* has been scheduled for conference. Petitioners are informed that this case will be conferenced on February 27, 1987. If certiorari is not then granted, the Court should defer consideration of the petition herein until the petitions in Nos. 86-637 and 86-966 are distributed, and consider and dispose of all three petitions at the same time.